

# San Francisco Bay Conservation and Development Commission

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North Coast Railroad Authority  
c/o Mitch Stogner, Executive Director  
419 Talmage Road, Suite M  
Ukiah, California 94582

Respondent

COMMISSION  
CEASE AND DESIST AND CIVIL PENALTY  
ORDER NO. CDO 2018.02

Effective Date: April X, 2018

TO NORTH COAST RAILROAD AUTHORITY:

## I. CEASE AND DESIST ORDER

Pursuant to California Government Code Section 66638, the North Coast Railroad Authority, all of its agents and employees, and any other persons acting on behalf of or in concert with it (collectively, "NCRA" or "Respondent") are hereby ordered to:

- A. Cease and desist from violating the McAteer-Petris Act ("MPA").
- B. Fully comply with the requirements of Sections III, IV, and V of this Cease and Desist and Civil Penalty Order.

## II. FINDINGS

This Order is based on the following findings. The administrative record in support of these findings includes documents cited herein and all additional documents cited in the Index of Administrative Record attached hereto.

- A. The violation occurred within the Commission's Bay jurisdiction at the northern end of Hunters Club Road in Novato, Marin County, Assessor's Parcel No. 157-051-09. The parcel is owned by the Sonoma Marin Area Rail Transit Authority (SMART). The site of the violation is where the road crosses an approximately 565-yard-long, unnamed slough that runs through Beattie Marsh, parallel to the Northwestern Pacific railroad line to the north, providing a tidal connection between the marsh and the Petaluma River via a culvert under the road.
- B. On March 29, 2016, BCDC staff received a complaint from a member of the public alleging that a retaining wall was being constructed in the Bay at the mouth of a slough under the Black Point Swing Bridge, concerned the retaining wall would block the flow of water and cause flooding.<sup>1</sup> Respondent was informed in a May 23, 2016

<sup>1</sup> BCDC Violation Investigation Report Form dated March 29, 2016.

letter by BCDC Chief of Enforcement Adrienne Klein that it had thirty-five (35) days to resolve the violation, or else be subject to the imposition of standardized administrative fines.<sup>2</sup> Respondent investigated complaint upon notification. Made site visit and interviewed NWP Co. personal. Discovered that the driveway had washed out as a result of a combination of a major rain event coupled with a high tide. The flooding floated out the existing culvert timber head wall and as a result when flood waters receded the driveway embankment lost approximately 5 yards of gravel material exposing a buried chlorinated potable water main. The drive at the time was used for access to the Black Point bridge operator house and by railroad personnel to operate the Black Point swing bridge for rail line commerce. As a result the timber headwall was retrieved and replaced to its original location and the roadway embankment was replaced to cover and protect the exposed water main to allow access to the bridge for operation. At the site I verified that the replacement of the headwall was indeed properly placed and that the culvert was not blocked. Made several return site visits subsequent to the event to assure that the culvert was not impacted by the event of the flood and the subsequent repair in-kind.

- C. From May 23, 2016 through August 2, 2017, BCDC staff pursued a resolution of the violation through the standardized administrative fine process, pursuant to BCDC Regulation (14 CCR) Section 11386, through correspondences and several phone conversations with Respondent. However, Respondent failed to comply to staff's repeated direction to seek and obtain a Commission permit to authorize the unpermitted Bay fill placed on the road and take affirmative actions to mitigate the damage wrought on the marsh, slough, and Bay by the washed out road debris. On June 28, 2017, BCDC staff informed Respondent that it would no longer have the opportunity to resolve the violation through the standardized fine process effective August 2, 2017 (i.e., after 35 days of the notice), and that staff would initiate formal enforcement proceedings.<sup>3</sup> Respondent was made aware of the requirements for a permit for this repair in-kind and maintained communication with BCDC on

<sup>2</sup> Letter by Adrienne Klein entitled, "Unauthorized reconstruction of a washed out road in the Petaluma River, in SF Bay, located west of the Black Point Bridge and east of Grandview Avenue (which intersects with Beattie Avenue and Harbor Drive) in Novato, Marin County (Enforcement File No. ER2016.017)," dated May 23, 2016.

<sup>3</sup> Letter from Matthew Trujillo entitled, "Termination of Standardized Fine Process to Resolve Violations of the McAteer-Petris Act; BCDC Enforcement File No. ER2016.017," dated June 28, 2017.

clarification of needed documentation. Respondent conducted site visits to understand and verify the claim that the repair had modified the flow of water from the frequent overtopping of the drive during the inflow and outflow of high tides. It was verified that the repaired road profile was high and was changing the normal tidal flow pattern that had existing over the driveway. As discussed with BCDC a survey was required to determine a regrading plan to bring the over topping tidal flow back to its normal pattern. A survey was completed and a grading plan was designed to correct the drive profile. Respondent had several calls with BCDC discussing permit conditions and explaining the complicated relationships between NCRA, SMART, NWP Co, and ARE. The survey and grading plan was submitted to BCDC for review. Respondent also hired a wetlands specialist to meet at the site to help with the permit application. Before the application process was completed another major flood event occurred and washed out the repair. During the above process the Black Point operator house had become abandon and the drive no longer required. As a result the repair was not required and a permanent solution of removing the drive became possible. This would than enable the complete removal of the drive and the apparent undersized culvert and alleviate the long standing issues of the drive being impacted by floodwaters and washouts.

- D. Administrative fines accrued to the maximum amount of \$30,000 on May 3, 2017.
- E. On September 5, 2017, BCDC staff mailed a Violation Report/Complaint for the Imposition of Administrative Civil Penalties ("Violation Report/Complaint") naming NCRA and the Sonoma-Marín Area Rail Transit Authority (SMART), the property owner, as co-respondents for the violation.<sup>4</sup>
- F. On October 3, 2017, BCDC staff met with NCRA Executive Director Mitch Stogner and NCRA's representative, David Anderson, to discuss the allegation set forth in the Violation Report/Complaint. They agreed to develop and implement a plan for removing gravel and any other unnatural material from the slough to the extent necessary to remediate the damages wrought on the Beattie Marsh and the slough that feeds it as a result of Respondent's placement of Bay fill in or adjacent to the slough for road repair purposes, which material was subsequently deposited in the

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<sup>4</sup> BCDC Violation Report/Complaint for the Imposition of Administrative Civil Penalties, dated September 5, 2017.

slough as a result of high water flows in the slough.<sup>5</sup> Respondent immediately mapped the area with a high resolution camera using a drone to determine the extent of the fill in the immediate area of the embankment erosion and the slough east of the drive to the Petaluma River. Respondent also meet with a hired environmental scientist to assess the impacted of the events and to assist with the development of the removal of the gravel that was observed from the mapping. A concept plan was developed that would minimize slough impacts. A schedule was also developed to avoid impacts to habitats. The understanding was that this was a preliminary plan to review with BCDC and any other concerning agencies.

- G. On October 16, 2017, SMART was dismissed from the enforcement proceedings without prejudice by the Executive Director of BCDC based on the information contained in its Statement of Defense received on October 6<sup>th</sup>,<sup>6</sup> and NCRA was granted an extension of the 35-day deadline until November 24, 2017 to submit its Statement of Defense.<sup>7</sup>
- H. On November 22, 2017, instead of a formal Statement of Defense, Respondent submitted to BCDC staff a plan to remove, "gravel and any other unnatural material from the slough to the extent necessary to remediate the damages wrought on the Beattie Marsh and the slough that feeds it."<sup>8</sup> See F. above.
- I. On January 10, 2018, staff informed NCRA that its remediation plan is inadequate, and that staff would be asking for a more comprehensive plan in the proposed order. Staff also informed NCRA that the Order would require NCRA to seek and obtain a Commission permit to secure the abandoned road against future wash-outs and would impose a civil penalty. Mr. Trujillo invited Respondent to work with staff to negotiate a proposed stipulated order to present to the Enforcement Committee

<sup>5</sup> E-mail by Matthew Trujillo entitled, "Violation Report/Complaint Served on 2017-09-05 for BCDC Enforcement File No. ER2016.017," dated October 5, 2017.

<sup>6</sup> E-mail by John Bowers entitled, "Violation Report/Complaint Served on 2017-09-05 for BCDC Enforcement File No. ER2016.017," dated October 16, 2017.

<sup>7</sup> E-mail by John Bowers entitled, "NCRA's Request to Extend the Deadline to Submit a Statement of Defense for Enforcement Proceeding No. 2016.017," dated October 16, 2017.

<sup>8</sup> NCRA's proposed mitigation plan, dated November 22, 2017.

but received no response.<sup>9</sup> Mr. Stogner relayed this notice to Respondents engineer whom called and left messages with interest to meet.

- J. On January 11, 2018, BCDC staff visited the site at low tide to observe and record the conditions of the surface of the road, the culvert beneath the road, the slough and marsh, the flow of water through the marsh and slough via the culvert, and the extent of road debris in the slough and marsh.<sup>10</sup> Staff notified Respondent about the site visit in advance by e-mail (January 9, 2018)<sup>11</sup> and phone (January 11, 2018) and invited them to attend, but Respondent did not acknowledge the invitation and did not attend the site visit. A three day notice is too short. As NCRA's engineer I would have wanted to take advantage of this opportunity to review the site with BCDC.
- K. On January 19, 2018, Mr. Trujillo emailed Respondent with a final invitation to engage in negotiations for a proposed stipulated order. Mr. Stogner replied on January 22, 2018 stating that he had directed Mr. Anderson to work with staff on a proposed stipulated order.<sup>12</sup> Mr. Anderson had on several occasions reached out to Mr. Trujillo to have a meeting to understand the inadequate response described above and explain the conceptual nature of the remedial plan.

### III. CONDITIONS

- A. On and after the Effective Date of this Order, Respondent shall cease and desist from all activity in violation of the MPA.
- B. No later than 45 (Respondent requests the 45days be extended to 90 days.) after the Effective Date of this Order, NCRA shall submit of a comprehensive plan for review and approval by the Executive Director for the remediation of the damage at the site, prepared by a qualified professional or professionals, after consultation with all relevant local, state and federal agencies, including, but not limited to the

<sup>9</sup> E-mail by Matthew Trujillo entitled, "Response to Your Implementation Plan and Rescheduling of the BCDC Enforcement Committee Hearing," dated January 10, 2018.

<sup>10</sup> Record of Observations and Notes by Adrienne Klein, Matthew Trujillo, Rafael Montes and Walt Deppe entitled, "Thursday, January 11, 2018 Site Visit to NCRA Roadway," January 2018.

<sup>11</sup> E-mail by Matthew Trujillo entitled, "Notice of Site Visit - BCDC Enforcement File No. ER2016.017," dated January 9, 2018.

<sup>12</sup> E-mail by Mitch Stogner entitled, "Response to Your Implementation Plan and Rescheduling of the BCDC Enforcement Committee Hearing," dated January 22, 2018.

Regional Water Quality Control Board, the Army Corps of Engineers, and the California Department of Fish and Wildlife.

The plan shall include, but may not be not limited to:

1. An assessment of the tidal cycle and storm effects in the area and the continued risk of road flooding and culvert congestion resulting from these influences. Respondent proposed scope: Complete a tidal study. This will consist of looking at published data on tides at the mouth of the Petaluma River and published storm data. It will also be based on Respondent's firsthand experience over the last 15 years
2. An assessment of the full extent, volume, and nature of the debris originating from the road and deposited in the culvert, slough, marsh, and, if applicable, the Petaluma River. Respondent proposed scope: Study the slough from the driveway to the Petaluma River to determine to the extent possible the limits of the gravel deposits from the 5 yards of fill placed and subsequently washed into the slough. Respondent will also relay on the current flight over this stretch of the slough with a high resolution video about 15 feet directly over the slough at low tide.
3. An assessment of all impacts to the habitat, including, but not limited to, the hydrology of the culvert, slough, and marsh, unnatural accretion and/or erosion, and any deleterious effects of the changes to the nature of the marsh and slough resulting from the wash out of the road and deposition of debris on plant and animal health. Respondent proposed scope: Review impacts to habitat. This will be done with an environmental scientist. Respondent will verify that the hydrology has not significantly impacted the habitat. These studies will be assisted by historical data where possible.
4. Provisions for the removal of all debris originating from the road as a direct or indirect result of the unpermitted road work that took place in or around the spring of 2016, including road debris that has been or will likely be deposited into the culvert, slough, marsh, and, if applicable, the Petaluma River as a result of subsequent storm and flood events during the intervening time period ranging from the last time the road was flooded in 2016/2017 through the date(s) that the remediation and mitigation work

will be completed in 2018 or later. Respondent proposed scope: Conduct surveys to determine the total amount of material that did erode and has eroded since the event from surveys that were taken immediately after the fill was placed and a survey of the drive as it exists today.

5. Provisions to ensure that the road and associated structures will not continue to pose a hazard to the marsh, slough, shoreline or bay after the remediation has been completed. Respondent proposed scope: Propose solutions to minimize the likelihood of erosion in the near future. The existing low crossing does not present solutions that would not be highly disruptive to the environment. **The feasible long term solution is to remove the drive which the respondent does not have the authority from the land owner to do nor is it the Respondent's responsibility to determine and provide long term solutions.**

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6. Provisions for the mitigation of any identified impacts to the habitat of the slough and marsh as a result of the unpermitted road work. An explanation of the methodology used to conduct the assessment and the analysis of the data, and an appendix containing the raw data Respondent proposed scope: Investigate with environment scientists to determine impacts and if needed mitigations. Respondent believes that there have not been impacts requiring mitigation.

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7. An implementation schedule including the dates by which the work will commence and finish, taking into account any work windows required by BCDC or other agencies to avoid effects to spawning, migration, or other critical activities of species that may be affected by the work. Respondent proposed scope: Implement a schedule to avoid effect on spawning, migration, or other species impacts.

8. A provision to monitor the site for no less than two years after the completion of the remediation work to ensure the remediation was a success. Respondent proposed scope: Monitor site for 2 years.

- C. Promptly after approval of the remediation plan by the Executive Director, Respondent shall implement the approved remediation plan in strict accordance with the implementation schedule specified therein.

D. Extension of Time

1. If Respondent believes that an event arising from a cause or causes beyond its control will delay timely compliance with any provision of Paragraphs III.B and III.C and justifies an extension of a compliance date set forth therein, Respondent shall notify BCDC's staff counsel by e-mail within five business days of when Respondent first knew of the event. The e-mail notice shall describe the cause(s) of the delay, the anticipated length of time the delay may persist, the measures taken or to be taken by Respondents to prevent or minimize the delay, the schedule by which these measures will be implemented, and the additional time requested to comply.
2. The Executive Director may grant an appropriate extension of time, for demonstrated good cause, to comply with any provision of Paragraphs III.B or III.C in response to a request made by Respondent pursuant to Paragraph III.D.1.

- E. No later than five days after fully implementing the approved remediation plan, Respondent shall submit to the Executive Director a written statement declaring that the project has been completed in accordance with the approved remediation plan signed by a qualified professional and the Executive Director of NCRA.

**IV. CIVIL PENALTY ORDER**

Pursuant to Government Code Sections 66641.5(e) and 66641.9, the Commission hereby assesses and orders Respondent to pay a civil penalty of \$30,000 within thirty days of the issuance of this order by remitting a cashier's check payable to the San Francisco Bay Conservation and Development Commission - Bay Fill Clean-Up and Abatement Fund. This penalty payment shall constitute Respondent's full and complete satisfaction of its liability for civil penalties for the alleged violation, through the date of this Order.

The total civil penalty of \$30,000 includes the following:

- (1) Respondent shall be assessed a penalty of 4,000 for its failure to seek and obtain a Commission permit to place fill in the Commission's jurisdiction in or around the spring of 2016, which is presumed to have taken place over at least two days at a rate of \$2,000 per day.
- (2) Respondents shall be assessed a penalty of \$100 per day for its failure to seek and obtain a Commission permit to authorize the unpermitted road work



after-the-fact from the date BCDC staff first notified Respondent of the violation on May 23, 2016, through the date Respondent lost the opportunity to resolve the enforcement action by paying a standardized administrative fine on August 2, 2017. At \$100/day, the penalty for this 436-day-long period shall be assessed a penalty \$24,000.

- (3) Respondents shall be assessed \$20 per day for the period from September 5, 2017, the date of issuance of the Violation Report/Complaint, through the date of issuance of this Order. At \$20/day, the penalty for this approximately 185-day-long period shall be assessed a penalty \$2,000.

The Commission finds that the amount of the penalty is reasonable and appropriate, given the nature, extent, and gravity of the violation, particularly its indirect, deleterious effects on the slough and the marsh, and the cost to the state in pursuing this enforcement action from May 23, 2016 through the date of issuance of this Order. This effort was shared by one Enforcement Analyst, the Chief of Enforcement, the Staff Counsel, the Chief Counsel, two administrative support staff, the Staff Engineer, and one Permit Analyst, with additional support by the Regulatory Director and the Executive Director.

With respect to Respondent, the amount of the daily civil penalty from May 23, 2016 to the present takes into account its claimed limited ability to pay (alleged, but unsubstantiated), its degree of culpability, and its voluntary resolution efforts undertaken. Respondent is a purportedly underfunded public entity that, as a lessee of the parcel, is limited in its authority to conduct intensive work on the road without the assent of the lessor. In the interests of resolving the violation, Respondent has made a limited effort to conduct a site survey and formulate a remediation plan. However, its efforts have been insufficient thus far, and those efforts are far outweighed by the significant damage to the nature of the site and the cost to the State in pursuing this enforcement action. Therefore, based on consideration of all relevant factors an assessment of total penalty of \$30,000, determined as described above, is warranted.

## V. TERMS

- A. Under Government Code Section 66641, any person who intentionally or negligently violates any cease and desist order issued by the Commission may be liable civilly in the sum of up to \$6,000 for each day in which such violations persist. In addition, upon the failure of any person to comply

with any cease and desist order issued by the Commission and upon the request of the Commission, the Attorney General of the State of California may petition the superior court for the issuance of a preliminary or permanent injunction, or both, restraining the person or persons from continuing any activity in violation of the cease and desist order.

- B. This Order does not affect any duties, right, or obligations under private agreements or under regulations of other public bodies.
- C. Respondent must conform strictly to this Order.
- D. This Order does not constitute a recognition of property rights.
- E. This Order is effective upon issuance thereof.

#### **VI. OPPORTUNITY FOR JUDICIAL REVIEW**

Under Government Code Sections 66639 and 66641.7(a), within thirty days after service of a copy of a cease and desist order and civil penalty order issued by the Commission, Respondent may file with the superior court a petition of writ of mandate for review of the order pursuant to Section 1094.5 of the Code of Civil Procedure.

FOR THE SAN FRANCISCO BAY CONSERVATION AND  
DEVELOPMENT COMMISSION

Dated: \_\_\_\_\_

Executive Director's Signature: \_\_\_\_\_  
Lawrence J. Goldzband